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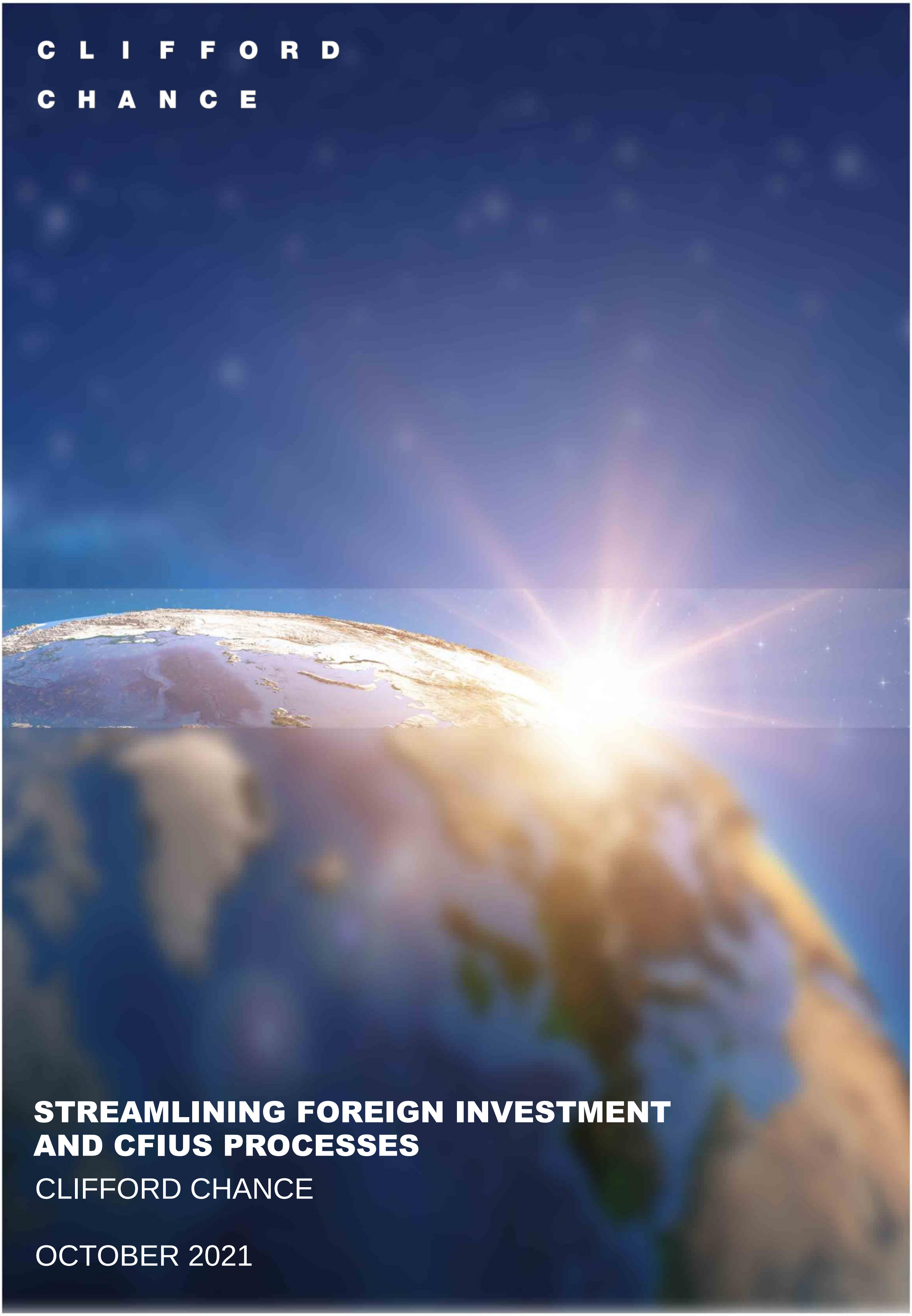


STREAMLINING FOREIGN INVESTMENT AND CFIUS PROCESSES

CLIFFORD CHANCE

OCTOBER 2021

SUPPORTING YOU ON ALL FUTURE INVESTMENTS

Navigating foreign investment regimes can be critical for success on a transaction

Foreign investment scrutiny is increasingly being applied to global M&A transactions. The global trend for protectionism has led to more restrictive government measures. This requires a more strategic and co-ordinated approach towards foreign investment rules.

Having one firm appointed to advise on all foreign investment filings ensures that you will receive a cost-effective, co-ordinated, high-quality and seamless service. Our experienced team, which also comprises former regulators, will build up a deep understanding of your business and the preferences of your legal function to deliver efficiencies and ensure that no "learning curve" is required for each new transaction.

We can provide the following services:

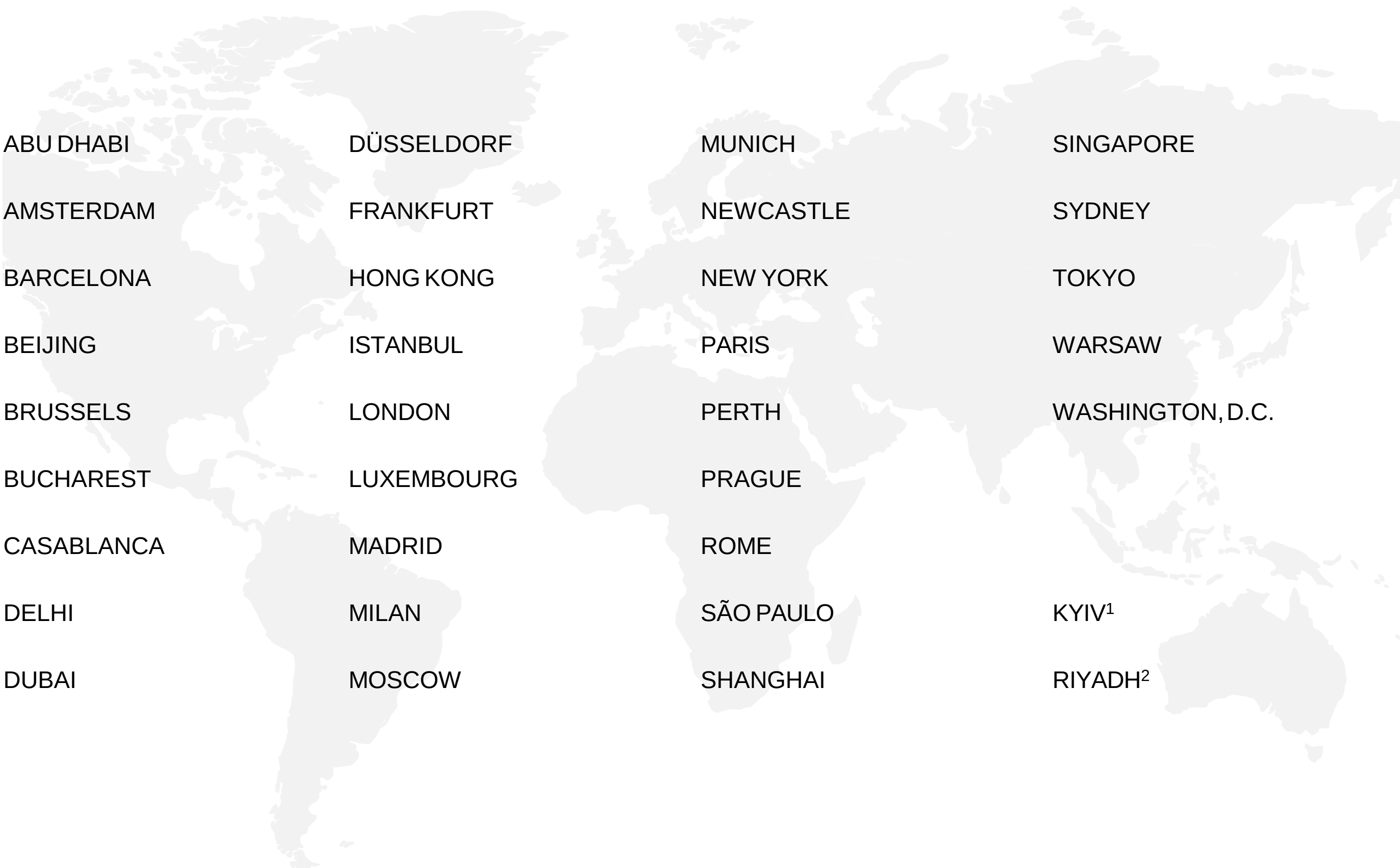
1. Identifying where foreign investment filings are triggered for each transaction, and carrying out an initial multi-jurisdictional foreign investment filing analysis.
2. Preparing any required foreign investment filings and engaging in any discussions with the authorities (pre- and post-notification), making any supplemental submissions and, to the extent required, agreeing remedies with the relevant authorities.
3. Identifying and addressing other related issues such as political and other stakeholder engagement.
4. Assisting you with navigating the foreign investment clearance process across all jurisdictions (working with our international network and local counsels when required). Clifford Chance would act as a "central hub" and co-ordinate each of the processes.
5. Assisting your in-house legal function with setting up standard protocols to help streamline the process for gathering and maintaining the information necessary for conducting future foreign investment filings.

OUR GLOBAL TEAM

We offer consistent high-quality advice with coverage in all key jurisdictions

With a large team of lawyers across the key hubs of Europe, Asia-Pacific and the U.S., we support our clients on their most complex and strategically important transactions where and when they need us.

This guide provides an overview of some of the key foreign investment regulations, including jurisdictions outside of the Clifford Chance network. We have a broad network of excellent relationships with local counsel that are experts in foreign investment issues and can assist with additional jurisdictions where required.



ABU DHABI	DÜSSELDORF	MUNICH	SINGAPORE
AMSTERDAM	FRANKFURT	NEWCASTLE	SYDNEY
BARCELONA	HONG KONG	NEW YORK	TOKYO
BEIJING	ISTANBUL	PARIS	WARSAW
BRUSSELS	LONDON	PERTH	WASHINGTON, D.C.
BUCHAREST	LUXEMBOURG	PRAGUE	
CASABLANCA	MADRID	ROME	
DELHI	MILAN	SÃO PAULO	KYIV[1]
DUBAI	MOSCOW	SHANGHAI	RIYADH[2]

1. Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

2. Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

WHAT SETS US APART

An extensive track record and global coverage

We advise on

Filings

- Co-ordination of multi-jurisdictional foreign investment filings.
- Advising throughout the whole foreign investment filing process (Phase I and Phase II proceedings).
- Advising on information requests.
- Negotiations with the respective regulatory authorities, including in relation to undertakings and remedies.

Policies and compliance

- Developing policies for dealing with challenging jurisdictions.
- Sophisticated and pragmatic approach to foreign investments, balancing commercial and risk management considerations.
- Setting up and/or maintaining foreign investment filings database.

Managing risks

- Identifying and managing regulatory risks.
- Involvement of communication and PR agencies to address the political aspects.
- Political lobbying and stakeholder engagement.

Training

- Regular training on best practice, trends and regulatory developments for legal and deal teams.
- Document production.
- Transaction rationale.
- Market practice/trends on risk sharing.

GOING BEYOND PURE LEGAL ADVICE

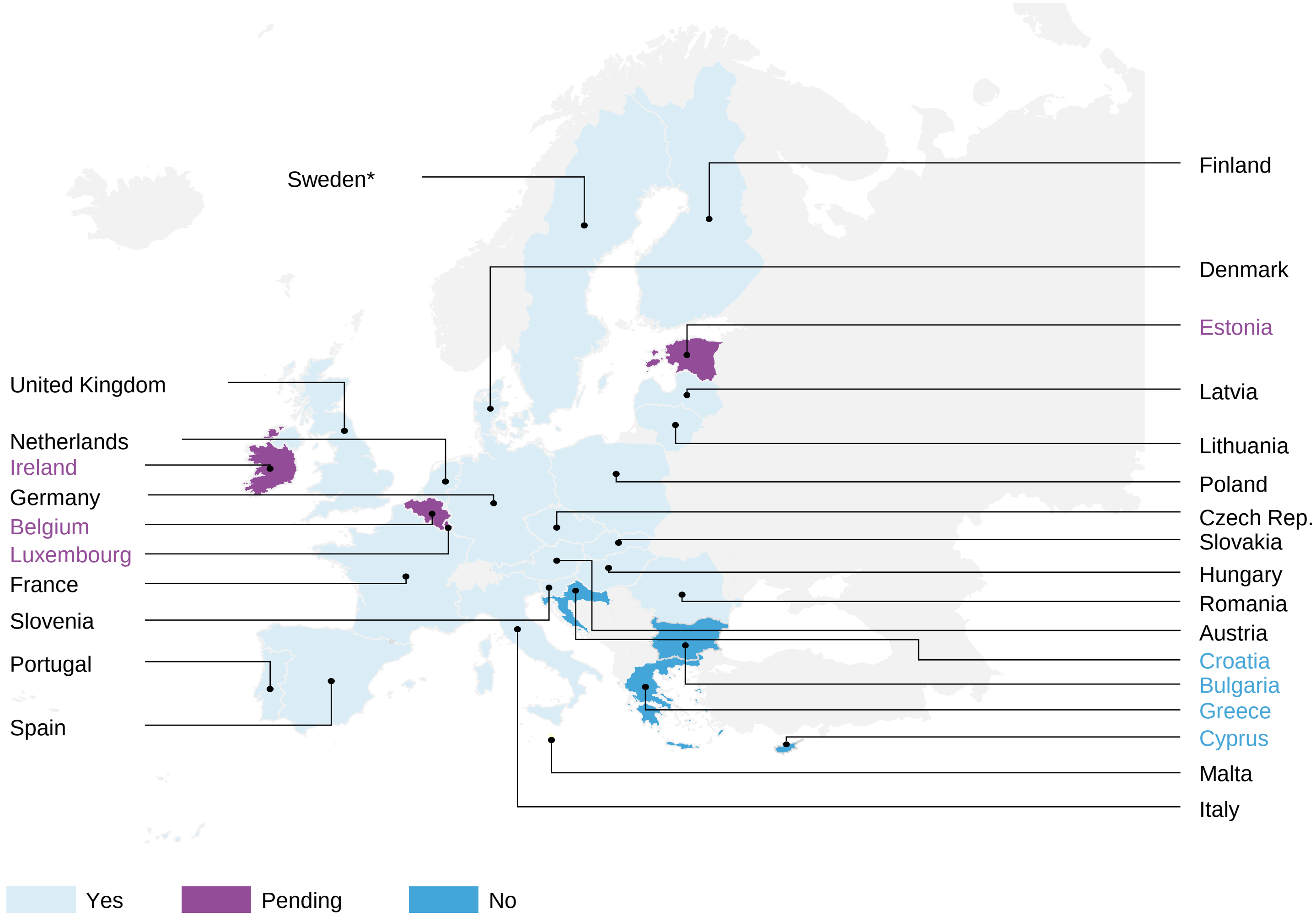
Our specialists have a wealth of experience in advising clients on the development of foreign investment frameworks in several established and emerging markets and jurisdictions. We are at the forefront of developments, and regularly participate in consultations and interest groups concerning regulatory and competition developments. We have advised on some of the largest and most complex foreign investment matters in recent years, and have helped clients overcome major regulatory hurdles in Europe, Asia-Pacific and the U.S. We have long-standing experience of handling Phase I and II investigations, and regularly act as global counsel to co-ordinate multi-jurisdictional foreign investment and merger control filings. We seek innovative solutions to protect our clients' strategic interests and to best achieve our clients' commercial objectives.

Several lawyers from our international team have experience as former regulators, including the EU Commission, U.S. Department of Justice and U.S. Federal Trade Commission, amongst others. Our strong relationships with government departments and antitrust authorities enable us to find commercially acceptable solutions for our clients even when remedies are required. Our excellent reputation amongst regulators combined with prior senior experience allows us to provide clients with unique insights into the mindset and workings of regulatory authorities.

An overview of member states with FDI regimes in place or pending

The map below offers a snapshot of which countries in Europe have FDI screening regimes in place.

19 Member States and the United Kingdom are reported to have screening mechanisms in place, with a further 4 Member States considering measures. 4 Member States – Bulgaria, Croatia, Cyprus and Greece – do not have, nor do they have plans to implement, an FDI screening regime.



*Taking into account the Swedish Protective Security Act (*Sw. Säkerhetsskyddslagen*) that entered into force on 1 January 2021

EUROPEAN UNION
(CONTINUED)

Purpose of the Regulation

The EU Screening Regulation 2019/452 established a framework for the EU Commission and the Member States to **exchange information** regarding foreign investment filings which are notified on a national level to the authorities of the Member States.

Member States were required to implement the co-operation mechanism established under the FDI Regulation by 11 October 2020.

The FDI Regulation does not create a new FDI regime but seeks to regulate the screening of FDI transactions across the EU.

Powers of the EU Commission

The EU Commission **does not have any power to block or impose remedies**. Instead, the EU Commission can issue a non-binding opinion to the Member State which undertakes the screening. The opinion of the EU Commission has to be taken into "due consideration". The same also applies to the non-binding comments from the other Member States. The final decision is always taken by the Member State which conducts the foreign investment screening.

Timeline

The EU Commission and other Member States have **35 calendar days** following receipt of complete information to submit the opinion and comments to the Member State which conducts the screening.

This **deadline can be extended** if the EU Commission and/or other Member States request further information.

Scope of the Regulation

The EU Screening Regulation applies to **critical infrastructure** including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure.

The scope of application also comprises critical technologies and dual-use items including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies. Further sectors caught by the EU Screening Regulation include supply of critical inputs, including energy or raw materials, food security, access to sensitive information, including personal data, or the ability to control such information and the freedom and pluralism of the media.

Finally, the EU Screening Regulation also applies to projects or programmes of EU interest as listed in an annex to the EU Screening Regulation (including, as regulated on 13 of July 2020, the Governmental Satellite Communications, known as Govsatcom, and the International Thermonuclear Experimental Reactor, or Iter).

Guidelines of the EU Commission

The EU Commission issued guidelines, on 25 March 2020, ahead of the application of the EU Screening Regulation in which it called upon the Member States that already have an existing screening mechanism in place to make full use of tools available to them under EU and national law to prevent capital flows from non-EU countries that could undermine Europe's security or public order. The EU Commission had also called on the remaining Member States to set up a fully fledged screening mechanism.

As per October 2021 – 19 Member States are reported to have screening mechanisms in place, with a further 4 Member States considering measures and 4 with no FDI regimes. On the basis of the derogation provided under Article 127(7)(b) of the EU-UK Withdrawal Agreement, the United Kingdom will not participate in the co-operation mechanism.

AUSTRIA

Type of filing requirement

Mandatory. According to the current legislation, foreign investment filings are **suspensory**. Thus, the approval of the Federal Minister for Digital and Economic Affairs (BMDW) will have to be obtained prior to closing. **Criminal sanctions**, including imprisonment, will be possible in cases of gun-jumping.

Nature of the review

The **Federal Minister for Digital and Economic Affairs** can prohibit the acquisition of an Austrian Target if there is risk of a threat to security or public order of Austria (or another EU member state). If such risk can be avoided with commitments/ remedies (*Auflagen*), the transaction must be cleared with commitments/ remedies. They are unilaterally imposed by the FDI authority (no public law contract). A potential threat to security or public order is triggered if the Austrian Target operates in a critical sector further specified in an Annex to the legislation.

Highly critical sectors are: Defence equipment and technologies, operation of critical energy infrastructure, operation of critical digital infrastructure, in particular 5G infrastructure, water, operating systems that guarantee the data sovereignty of the Republic of Austria, research and development in the fields of medicines, vaccines, medical devices and personal protective equipment.

"Merely" critical sectors are in particular: critical infrastructures (e.g., in energy, IT, transport, telecoms), critical technologies and dual-use items (e.g., artificial intelligence, semiconductors, defence technologies), security of supply of critical inputs (e.g., energy, raw materials, food, medicines and vaccines), access to or ability to control sensitive information, freedom and pluralism of the media.

Timetable

- EU Screening mechanism (introductory phase): **35 days (or longer)**.
- Phase I: **additional one month (no extension possible)**.
- Phase II: **additional two months (no extension possible)**.

The timeline is **stopped** if the Federal Minister for Digital and Economic Affairs deems the submitted information to be incomplete.

Triggering events

Direct or indirect acquisition by a **non-EU/ non-EEA/ non-Swiss investor** of:

- a business or legal entity located in Austria;
- material parts of a business located in Austria resulting in the acquisition of a controlling influence over such parts of a business;
- a controlling influence over a business or legal entity located in Austria; or
- voting rights of at least 10% (if the Austrian Target is active in a highly critical sector) or 25% (if the Austrian Target is active in a "merely" critical sector).

A foreign investor in a continuous **10%** (or **25%**) chain will be subject to a filing requirement even if the foreign investor is ultimately controlled by an EU/ EEA/ Swiss entity.

If the Austrian Target is a microenterprise, the acquisition is exempted from the mandatory filing obligation.

Case study:

A US investor planned to acquire IP rights and assets for the production and sale of a medical product. For a transitional period, the medical product should be produced by an Austrian entity on the basis of a tolling agreement with the US investor. The Federal Minister for Digital and Economic Affairs opened Phase II proceedings based on a statement of the Austrian Federal Ministry of Health that this medical product would be critical due to its unique and non-substitutable nature for specific treatments. Finally, the transaction was cleared with a commitment (*Auflage*) that the acquirer must ensure continued supply of the Austrian health market on the basis of existing demands (and also excess volumes to the extent production and distribution capacities are available). This was the first Phase II case ever (end of December 2020).

CZECH REPUBLIC

Type of filing requirement

Mandatory. The Czech FI Act requires that approval of the Ministry of Industry and Trade must be requested prior to making an investment into a number of strategic sectors. **Financial penalties**. Failure to comply with statutory obligations may result in administrative fines up to the amount of **2%** of turnover (or up to approximately EUR 3.8 million, if the turnover cannot be determined) of the foreign investor.

Nature of the review

The Czech FI Act applies to investors whose residence (or nationality, if an investor is a natural person) is located outside the EU; or investors directly or indirectly controlled by persons whose residence (or nationality, if an investor is a natural person) is located outside the EU.

Sector-specific scrutiny relates to (i) manufacturing, research, development, innovation or ensuring the life cycle of arms and military equipment; (ii) critical infrastructure; (iii) critical cybersecurity infrastructure, and (iv) dual-use items (including software and technology, which can be used for both civil and military purposes).

Timetable

In general, the Ministry has 90 days to issue its approval. This time period may be extended by up to 30 days in particularly complex cases. Any foreign investor may request consultation with the Ministry before completing the transaction. Such consultation would be advisable especially in cases when it is not certain whether the Czech FI Act will be applicable.

Triggering events

Under the Czech FI Act, a relevant transaction is one that results in a non-EU investor, directly or indirectly acquiring:

- a stake equal to or greater than 10% of voting rights in the Target;
- a membership of the foreign investor (or its related party) in corporate bodies of the Target;
- the asset through which the Target's business activity is carried out by the investor; or
- any other type of control resulting in the foreign investor gaining access to information, systems or technology which are important in connection with the protection of the security of the Czech Republic, or its internal or public order.

Update on the FDI regime

On 19 January 2021, the Czech Parliament passed a new act that aims to strengthen the control of foreign direct investments in the Czech Republic (the "**Czech FI Act**"). It became effective on 1 May 2021.

The Czech FI Act has a significant impact on many strategic investments from non-EU countries.

FRANCE

Type of filing requirement

Mandatory and suspensory. The approval of the Minister for the Economy must be obtained prior to making an investment in a number of strategic sectors.

Financial penalties. Maximum penalty is the highest of: (i) twice the amount of the investment, (ii) **10%** of the annual turnover (excluding taxes) of the Target company and (iii) EUR 5 million for legal entities and EUR 1 million for individuals – and **criminal fines**.

Nature of the review

The Minister for the Economy may intervene where transactions concern activities:

- likely to jeopardise national defence interests, the exercise of public authority, public order or public safety;
- concerning essential infrastructure, goods or services, critical technologies or the research and development of dual-use goods;
- in relation to infrastructure, goods or services that are vital to guaranteeing certain domains (e.g., integrity, security and continuity of the water and energy supply, or the protection of public health).

Timetable

A decision can be expected within **30 business days** from the request for clearance. This review period can be **extended by a further 45 business days** in complex matters. A Target can seek an opinion from the Minister at any time, to establish whether it falls within the scope of the regime; the Minister must reply within **two months**.

Triggering event(s)

- Prior authorisation will be required in case of:
  - acquisition of control, as defined in article L. 233-3 of the French Commercial Code, of any French law entity;
  - acquisition, in part or in full, of any business division operated by a French law entity; or
  - for non-EU/ EEA investors only, the acquisition, directly or indirectly, solely or in concert, of more than **25% of the voting rights in a French law entity**.

  ***NB**: the 25% threshold has been lowered to 10%, only for listed companies in France active in "strategic sectors". Intended to be temporary until 31 December 2021 and only concerns non-EU/ EEA investors.*

- **A foreign investor** in a chain of control will be subject to a filing requirement even if the foreign investor is ultimately controlled by a French entity.
- The regime extends to all **Target entities governed by French law** carrying out activities in **a strategic sector**, including those with no legal personality, such as branches of undertakings with registered offices outside of France.
- The **list of strategic sectors is extensive and was expanded in April 2020** to include (i) agricultural products contributing to national food security objectives, (ii) political and general information press services, (iii) quantum technologies, (iv) energy storage and (v) biotechnologies.
- The **list of strategic sectors was further expanded in September 2021** to include technologies involved in the production of renewable energy.

Recent vetoes

Even if formal vetoes remain extremely rare, the French Ministry of the Economy publicly tightened its position as it issued two negative decisions over the past few months that made headlines:

- the French Ministry of the Economy rejected in December 2020 the proposed acquisition by the US company **Teledyne Technologies Inc.** of **Photonis**, a leading French company for night vision devices supplying NATO special forces with night vision equipment and developing instrumentation for the French nuclear deterrent;
- more recently, in January 2021, the French Ministry of the Economy vetoed Canadian retailer **Couche-Tard's** buy-out of **Carrefour** in the name of French food sovereignty, a further stark reminder of the new foreign investment controls.

GERMANY

Type of filing requirement

Mandatory. According to the current legislation, foreign investment filings are **suspensory**. Thus, the approval of the Federal Ministry for Economic Affairs and Energy will have to be obtained prior to closing. **Criminal sanctions**, including imprisonment, will be possible in cases of gun-jumping.

Nature of the review

The **Federal Ministry for Economic Affairs and Energy** can prohibit the acquisition of a German Target if the transaction leads to a "probable adverse effect" to the public order or security of Germany or of another EU Member State or in relation to certain EU programmes/ projects.

Cross-sectoral scrutiny includes, amongst others, the following industries:

- critical infrastructure (energy, water, telecommunications, finance and insurance, healthcare, transportation and food), media, certain cloud and telematics services, and certain telecommunications surveillance measures;
- essential pharmaceuticals, medical products and in-vitro diagnostics, in particular for the treatment of highly infectious diseases, and medical personal protective equipment;
- certain areas of earth remote sensing systems, artificial intelligence, autonomous driving or flying, industrial robots, semiconductors, cybersecurity, aeronautical/aerospace, nuclear technology, smart meter gateways, information and communication technology, critical raw materials, secret patents, and agricultural real estate.

Sector-specific scrutiny relates to the defence sector, in particular weapons, and certain cryptographic products, as well as specific dual-use products.

Timetable

Cross-sectoral and sector-specific scrutiny:

- Phase I: **two months**
- Phase II: **additional four months**.

In complex cases, Phase II proceedings can be further extended by a **further four months**. An additional deadline extension is possible upon the parties' consent. The timeline is **stopped** if the Federal Ministry for Economic Affairs and Energy deems the submitted information to be incomplete or if the parties enter into remedy negotiations with the German government.

Triggering event(s)

Cross-sectoral scrutiny: Indirect or direct acquisition by non-EU investors of at least **10%** of the voting rights in a German Target active in critical infrastructure, IT services, or the media, or 20% of the voting rights in a German Target active in any of the other industries, listed in the second and third bullet points in the left column. For the industries which are not listed in the left-hand column, a **25%** threshold applies.

The **filing obligation** exists only regarding the industries in relation to which the10% or 20% thresholds apply. The 25% threshold does not lead to a filing requirement. However, the Federal Ministry of Economic Affairs and Energy has the discretion to call in such transactions. The same also applies in relation to certain acquisitions of "**control**" even if the 10% or 20% thresholds are not met (e.g., right to nominate board members).

Sector-specific scrutiny: Indirect or direct acquisition of at least 10% of the voting rights in a German Target by **non-German** investors.

A foreign investor in a continuous **10%** (or **20%/25%**) chain will be subject to a filing requirement even if the foreign investor is ultimately controlled by a German entity.

Case study:
50 Hertz/State Grid

State Grid intended to acquire a certain percentage of the voting rights in 50 Hertz, one of the German TSOs (transmission system operators). The number of shares to be acquired was below the relevant threshold at that time. Despite the fact that the German government did not have jurisdiction, it prevented the transaction by practical measures, inter alia, by involving the state-owned KfW bank as a "white knight". This transaction was the main reason for the German government to lower the threshold for critical infrastructures to 10% of voting rights.

HUNGARY

Type of filing requirement – two different regimes

Mandatory and suspensory. Currently there are two different FDI regimes in Hungary, both of which are **mandatory** and require prior notification to and acknowledgement by the competent Minister (Minister of Interior/ Minister of Innovation and Technology) before implementing transactions. The first regime mainly concerns activities that are closely related to national security (e.g., production of weapons, providing public services and financial services) and this regime was introduced in 2018 following EU recommendations ("**General FDI Regime**"). The second temporary regime, introduced in 2020 due to the COVID-19 epidemic, has a much wider scope including most sectors of the economy ("**Special FDI Regime**") ("***strategic activities and sectors***").

Sanctions for non-compliance include fines up to approx. EUR 28,000 (General FDI Regime) or double the transaction value (Special FDI Regime). The transaction will be considered null and void in both cases.

Nature of the review

The competent Ministries for both regimes will examine whether the contemplated transaction "harms the security interests of Hungary". The Ministers evaluate:

a) whether the proposed transaction endangers or threatens to endanger the national interest, public order or public security of Hungary (General and Special FDI Regime);

b) whether the applicant is directly or indirectly under the control of any administrative agency of any non-EU state (Special FDI Regime);

c) whether the applicant was involved in any activity relating to a public security or public order issue in any other member state (Special FDI Regime);

d) whether there is substantial risk that the applicant will commit any crime or illegal activity (Special FDI Regime).

If the Minister finds that any of the foregoing conditions apply, it shall issue a decision which forbids completion of the contemplated transaction, otherwise the Minister shall approve the notification.

Timetable

The notification shall be made **under both regimes** within **10 days** from signing the relevant agreement (i.e., SPA in most cases) and the competent minister has **60 days** (General FDI Regime) or **30 business days** (Special FDI Regime) to decide on the transaction. These deadlines may be extended by an additional **60 or 15 days**. The procurement of the approval of the relevant Ministry should be treated as a condition precedent in the transaction documents.

Triggering event(s)

Different triggering events apply under the different regimes but both regimes apply in relation to the activity of foreign investors in strategic sectors in Hungary. Both regimes apply to both share and asset transactions.

Triggering events under the General FDI Regime – both share and asset deals – are caught:

a) a foreign investor establishes a new Hungarian company or acquires a stake in an existing Hungarian company, solely or together with other foreign investor(s), exceeding 25% (for privately held companies) or 10% (in publicly listed companies), or acquires a 'dominant influence'; or

b) foreign investor(s) acquire(s) a stake of less than 25% in a privately held company registered in Hungary, but the total stake thus held by foreign investor(s) as a result exceeds 25%; or

c) a foreign investor registers a branch office in Hungary for the purpose of carrying out strategic activities; or

d) a foreign investor acquires assets or a right to operate or use infrastructure or assets that are used for carrying out strategic activities; or

e) a company registered in Hungary, in which foreign investor(s) hold a stake equivalent to that in point a) or b) above, takes up a strategic activity.

Triggering events under the Special FDI Regime:
Acquisition of ownership interest; capital increase; mergers, demergers, transformations to another company form; issuance of bonds which are convertible or convert to equity or provide preferential subscription rights; establishing usufruct over equity, provided that as a result the foreign investor would acquire directly or indirectly:

(i) majority control; or (ii) at least 10% ownership interest, if the investment reaches or exceeds approx. EUR 1 million; or (iii) any level of interest which, if computed together with any other foreign investors' interest(s), exceeds 25%. Any acquisition of an increased ownership interest reaching 15%, 20% or 50% needs to be notified.

In addition, irrespective of ownership thresholds or transaction sizes, the transfer of using/ operational rights of infrastructure and assets that are 'indispensable for the operation' of strategic companies require both notification to and approval by the Minister.

Case study: Blocking Aegon's business sale

On 7 April 2021, the Hungarian Minister of Interior refused to approve the previously announced sale of Aegon's Central and Eastern European operations to Vienna Insurance Group. Under the EUR 830 million deal, VIG had agreed to acquire Aegon's insurance, pension, and asset management business in Hungary, Poland, Romania and Turkey. The decision of the Ministry stated that the intended acquisition by a foreign investor of the Aegon companies in Hungary is denied and the transaction was not closed as a result of that decision.

ITALY

Type of filing requirement

Mandatory and suspensory. The transaction can be implemented only when the approval of the Presidency of Council of Ministries has been obtained (the time-limit for it to exercise its powers has passed).

Where no notification is made, review proceedings may be commenced. In addition to the acquisition being void, and unless the violation implies a criminal offence, a pecuniary fine up to double the value of the transaction and, in any case, not less than **1%** of the cumulative turnover realised by the involved companies can be imposed.

Nature of the review

The Presidency can (i) oppose the acquisition of the Target, (ii) impose conditions or (iii) veto strategic companies' resolutions in case of the threat of serious prejudice to the following relevant strategic sectors:

- defence and national security;
- energy, transport and communications;
- water and health;
- raw materials and food industry;
- data and sensitive information processing/ storage/ access/ control access to sensitive information (e.g., personal data, or the ability to control such information);
- the freedom and pluralism of the media;
- financial, including credit and insurance, sectors and financial market infrastructure;
- Artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnologies, biotechnologies;
- Non-military aerospace infrastructure and technologies;
- critical technologies and dual-use items; and
- electoral infrastructure sector.

Any transactions that involve the transfer of assets (including technologies and IP rights) in the aforementioned sector – subject to the fulfillment of the conditions listed under section "Triggering events" – must be notified.

For the 5G sector, special provisions apply.

Timetable

The review proceedings can last 45 calendar days (30 calendar days for the 5G sector) at most. This time limit can be extended (up to 10 calendar days, if additional information is required to the parties, and, up to 20 calendar days if additional information is required to third parties).

Triggering event(s)

Acquisition of strategic Targets. For Targets strategic for defence and national security, notification is due for acquisition of more than **3%** of its share capital

All other sectors (except for 5G). Under a temporary regime (in force until 31 December 2021) notification is due:

- if EU acquirers, for acquisition of direct or indirect **control**; and
- if non-EU acquirers, (i) for direct or indirect acquisitions of a stake (or voting rights) equal to at least **10%** of the Target's capital AND the investment's value is at least equal to EUR 1 million, or (ii) for direct or indirect acquisitions of a stake equal to **15%, 20%, 25% or 50%**.

Adoption of significant resolutions, acts or transactions (e.g., those resulting in the loss of ownership, control and availability of strategic assets).

Case study: Acquisition of a significant stake in TIM S.p.A. by Vivendi S.A.

Vivendi S.A. acquired a stake in the share capital of TIM S.p.A. – a leading Italian communications company – sufficient to trigger notification to the Presidency. However, notification was not filed. The Presidency opened *ex officio* the review proceedings and imposed (1) certain conditions concerning TIM S.p.A.'s governance and (2) a fine of EUR 74.3 million on TIM S.p.A. for failure to notify the acquisition of control and availability of TIM S.p.A.'s strategic assets by Vivendi S.A.

NETHERLANDS

Type of filing requirement

Mandatory. The draft Act requires that approval by the Minister of Economic Affairs and Climate must be obtained prior to making an investment. **Financial penalties**. Failure to comply with the notification requirements, implementation without authorisation and other breaches of the draft Act may be subject to a fine up to 10% of the turnover of the relevant undertaking.

Nature of the review

The draft Act as it currently stands captures undertakings active in *vital processes or sensitive technologies* in the Netherlands.

While it is still subject to changes pending parliamentary discussions of the draft Act, it is expected that certain activities or functions within the energy and banking sectors, as well as certain activities at Amsterdam airport and the port of Rotterdam, are considered vital and thus in scope. By way of example, military goods and dual-use items are considered sensitive technologies, in accordance with EU regulations.

The Minister of Economic Affairs and Climate will assess whether the investment could pose a **threat to national security** by taking into account various factors including, for example:

- (a lack of transparency in) the ownership structure of the investor;
- any restrictive sanction measures or obligations imposed on the investor; and
- the level of security or safety in the country of origin of the investor.

The investment will be allowed either unconditionally or with conditions to the effect that certain mitigating measures are met, such as additional security requirements or the appointment of a security officer. The investment will be prohibited if the national security risks cannot be remedied through mitigating measures.

Timetable

The Minister of Economic Affairs and Climate will initially have **eight weeks** after notification to take a decision, but that may be **extended by six months**. If **further investigation** is required, a second phase of another eight weeks will apply and another extension of six months is possible, although the first phase period will be deducted. Finally, if the EU FDI screening regulation applies, an additional three months' extension is possible. So-called "stop the clock" questions may suspend the statutory review period at any time.

Triggering events

It is currently envisaged that the draft Act is triggered when an investor acquires *control*, the concept widely used in both Dutch and EU competition law. In essence, that is the capacity to exercise decisive influence over an undertaking. In addition, a lower threshold may apply to sensitive technologies, for example the acquisition/ increase of "significant influence". An as yet unpublished ministerial order will specify when these are to apply.

Forthcoming cross-sector regime

A legislative proposal for a cross-sector 'foreign' direct investment regime (it may also apply to acquisitions by Dutch investors) has been submitted to parliament by the Dutch government on 30 June 2021. Pending the parliamentary process, the exact scope of the proposal may still change. It is not clear when it will subsequently enter into force. However, it is envisaged to have retroactive effect from 8 September 2020 allowing the Minister of Economic Affairs and Climate to intervene in investments made after that date. Parties will then still only need to notify if ordered to do so in relation to national security risks.

Type of filing requirement

Mandatory. The act requires that approval of the Minister of Economic Affairs and Climate must be requested prior to making an investment. **Financial penalties**. Failure to comply with the notification requirements and other violations of the obligations in relation to the draft act may be penalised by a fine up to EUR 900,000.

Nature of the review

The act enables the Minister of Economic Affairs and Climate to review and **block an acquisition** leading to **predominant control** over a Dutch telecommunications party and to **intervene in the existing ownership** of such control, where predominant control is acquired or held by an **undesired person** if this would lead to a **threat to public interest,** including **national security** and **public order**.

The act relates to the control of **telecommunications parties in a broad sense**, as it comprises not only providers of electronic communications networks and services, but also providers of hosting services, data centres, trust services and internet exchange points.

Timetable

The Minister of Economic Affairs and Climate will have **eight weeks** after notification to decide whether it will prohibit the proposed acquisition. As this is also subject to so-called "stop the clock" questions, it may in practice take longer than eight weeks. If the Minister is of the opinion that **further investigation** is required, the review period may be **extended by six months**.

Triggering events

The act provides that predominant control (*overwegende zeggenschap*) in any event concerns: (i) the possession (solely or jointly) of at least **30%** of the (direct or indirect) voting rights; (ii) the ability to name **more than half the board members**; or (iii) the ability to exercise control through **special governance rights**.

Telecoms specific regime

The act on undesired control in telecommunications (*Wet ongewenste zeggenschap telecommunicatie*) entered into force on 1 October 2020 (with retroactive effect to 1 March 2020).

POLAND

Type of filing requirement

Mandatory. The Polish FDI Regime requires that approval of the Polish Competition Authority (the "**PCA**") must be obtained prior to completion of a transaction. Moreover, the notification procedure should be commenced prior to signing of a preliminary agreement obliging an investor to make the FDI acquisition or, in the case of the acquisition of a Warsaw Stock Exchange (WSE)-listed company, by way of a public tender offer prior to announcement of the tender offer.

Sanctions. Failure to comply with the requirements may be penalised by a fine of **PLN 50 million** (approx. **EUR 11 million**) or imprisonment of between **six months** and **five years**. Furthermore, any transaction made in breach of the Polish FDI Regime will be null and void and the investor will not be able to exercise its rights attached to the acquired shares.

Nature of the review

The Polish FDI Regime introduced a clearance procedure for the acquisition of control or a significant share/capital in certain Polish companies by non-EU/ EEA/ OECD investors.

If a transaction concerns a Polish entity that is:

- a public company listed on WSE;
- a company that operates in any of listed sectors;
- a company active in development of software in certain sectors; or
- a company that owns "critical infrastructure",

it will be subject to the new Polish FDI Regime and will require the prior clearance of the PCA.

Sector-specific scrutiny relates to: (i) energy, (ii) fuels, (iii) chemicals, (iv) weapons and military technologies, (v) trans-shipment in ports, (vi) medical equipment and pharmaceuticals, (vii) processing of food and (viii) development of software used in: (a) supply of electricity, fuels, heat, (b) supply of water and waste treatment, (c) data storage and transmission, (d) cash/card payments, securities and derivatives transactions, and insurance services, (e) hospitals, laboratories and sale of prescription drugs, (f) transportation, (g) supply of food, (h) data gathering, cloud computing.

Timetable

Following the notification, the PCA will have 30 days to complete the initial proceedings and approve the FDI transaction or initiate additional control proceedings, which may last up to 120 days.

Triggering events

Under the Polish FDI Regime, a relevant transaction will be one that results in a foreign (i.e., non-EU/ EEA/ OECD) investor:

- acquiring a stake equal to or greater than 20% and 40% of the total number of votes in a Polish company or, in the case of a Polish partnership, making a contribution to a Polish partnership equal to or greater than 20% and 40% of the total contributions in the partnership;
- acquiring a participation in the profit of a Polish company equal to or greater than 20% and 40%;
- otherwise acquiring a significant participation in or a dominant position over a Polish company, e.g., via the acquisition or lease of an organised part of the enterprise from a Polish company, entering into a control (management) and/ or profit transfer agreement over a Polish company, or acquisition of majority of votes in a Polish company.

De minimis exemption applies, If the target's Polish turnover was below EUR 10 million in each of the 2 years preceding the transaction.

Case study: H&F Corporate Investors VIII /ePłatności

The first transaction notified under the Polish FDI Regime concerned an acquisition of Centrum Rozliczeń Elektronicznych Polskie ePłatności – a company active in the processing of cashless transaction and sale/ rental of payment terminals – by H&F Corporate Investors VIII, a Cayman Islands-based investment fund specialising in online services, business software and financial services. The PCA cleared the transaction and pointed out that *FDI rules are intended to protect key Polish companies, but may not block important foreign investments, therefore most cases will be decided quickly*.

ROMANIA

Type of filing requirement

Mandatory. A transaction involving a change of control and performed in a number of areas of interest from a national security perspective can be implemented if the Supreme Council of National Defense (the CSAT – an independent national security authority, with its board members including the Romanian President, Romanian Prime Minister, several ministers, army and intelligence services heads) issues a positive opinion.

If the CSAT issues a negative opinion (i.e., it considers that the transaction poses a risk to national security) it will notify the Romanian Government which may issue a decision prohibiting the transaction, with the observance of the European Commission's competences in this respect.

There are currently no provisions regulating a stand-still obligation until such national security clearance is received. Hypothetically, if the CSAT reviews a transaction and advises the Romanian Government to prohibit it and this is provided after its completion, this will most likely include an obligation to the parties to rescind/ amend the respective transaction, but there are no express legal provisions regulating such a case.

Nature of the review

The CSAT reviews transactions which imply a change of control performed in a number of areas of interest from a national security perspective.

The correspondence with the CSAT is made through the Romanian Competition Council (RCC).

If the transaction is notifiable to the RCC from a merger control perspective, the notifying party/ parties will submit only the merger clearance notification to the RCC and the RCC may refer the transaction to the CSAT for a national security review. In this case, the RCC extracts the necessary information from the merger filing and sends them to the CSAT. The parties do not have access to that filing. The CSAT analysis is performed simultaneously with the RCC merger control procedure, and the RCC can issue a decision even before the CSAT analysis is finalised, but from our experience it seems that the RCC prefers to wait for the CSAT responses before issuing its own decision.

For transactions which are not notifiable to the RCC from a merger control perspective, namely (a) the merger control thresholds in Romania are not met, or (b) the transaction is notifiable elsewhere outside Romania (e.g., to the European Commission, or other national jurisdictions), a specific notification should be submitted by the parties to the RCC, which will subsequently refer it to the CSAT. Such notification does not have a standard form, but it should contain at least the following information: (i) structure of the transaction (merger, acquisition, etc.), (ii) the parties and their identification details, (iii) the areas of activity of the parties to the transaction, and (iv) the object of the transaction (shares, assets, etc.).

ROMANIA
(CONTINUED)

Timetable

There are currently no mandatory deadlines for CSAT review and response.

From our experience, the CSAT issues a positive response in about 45-60 calendar days from filing, while in case of opening a more in-depth analysis or investigation, the review is expected to take much longer.

The RCC may request additional information from the parties

If the CSAT informs the RCC that the transaction should be analysed from a national security perspective, the RCC will further inform the parties.

If there is also a merger control procedure performed by the RCC, such deadlines shall be suspended until a final decision of the CSAT is notified to the RCC (whether to prohibit or to conclude that the concentration does not raise risks for the national security).

Triggering event(s)

Transactions involving a change of control and related to areas of interest for national security. Such areas of interest are broadly defined, are established pursuant to national or sector security strategies and relate to:

- security of financial, fiscal, banking and insurance activities; energy; critical infrastructure; IT and communication systems; transports; industrial; systems of supply of essential resources; trade and production of military weapons and equipment, ammunition and explosible, toxic substances; the citizens and of the collectivities, borders;
- protection of agriculture and environment;
- protection of privatisations of state-owned enterprises or the management thereof;
- protection against disasters.

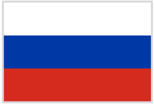
Expected changes to the current foreign direct investment (FDI) framework:

The RCC published several drafts for a new law to amend the current screening mechanism, but the final version is still pending. The entry into force of the new regime is expected towards the end of the year.

The main changes expected to be brought by the new regime include:

- the review of investments exceeding the RON equivalent of EUR 2,000,000 by entities from outside the EU or which are controlled directly or indirectly by an entity from outside of the EU (it is unclear whether this is limited to transactions involving a change of control);
- the business areas will include the current reviewed areas, but the review is extended to include investments which are deemed as likely affecting national security or public order, along with other new areas;
- sanctions – breaching the stand-still obligation may be sanctioned with fines between 1% and 5% of the investors' total turnover achieved in the year prior to the sanction. The same sanction applies for providing incorrect, incomplete and misleading information;
- a new express timetable, and new procedures and consultation mechanisms with the other Member States and the Commission;
- new screening and clearance authorities – a newly established Romanian Commission for Screening of Foreign Direct Investments will review the FDIs and issue mandatory endorsements, other authorities may be involved, as well as the CSAT.

RUSSIA



Type of filing requirement

Mandatory and suspensory. Approval of the Governmental Commission for Control over Foreign Investments must be obtained prior to closing. Transactions closed in breach of the regime are null and void. In relation to transactions taking place offshore, the Russian courts may strip the voting rights from shares acquired by a foreign investor.

Nature of the review

Clearance is required in two scenarios: (i) a Russian Target company is active in so-called strategic activities, and/ or (ii) the acquirer is a public foreign investor.

The law lists 48 types of strategic activities, however, there is a trend to construe this list broadly. Key sectors include aviation, airports, subsoil, natural monopolies, pharma, cryptography, telecommunications and media.

Timetable

Legally, the review process should be completed within **six months**. However, in practice, the process can take significantly longer, partially because the Governmental Commission only convenes three or four times a year.

Triggering events

Prior approval is required for the direct or indirect acquisition by a foreign investor of control over a Russian strategic entity, which includes:

- for private foreign investors: stakes above **50%** in a strategic company (or **25%** in the subsoil sector);
- for state-owned foreign investors: stakes above **25%** in a strategic company (or **5%** in the subsoil sector); or
- acquisition of equivalent rights or of assets from a strategic company.

In addition, public foreign investors are required to obtain approval for any direct or indirect acquisition of more than **25%** of the shares or equivalent rights in *any* (i.e., non-strategic) Russian company.

***Ad hoc* resolutions**. The chairman of the Governmental Commission is entitled to issue *ad hoc* resolutions at his/ her discretion requiring that approval must be obtained for any other transaction that concerns a Russian entity, i.e., for any transaction that does not technically fall under the regime. Based on current practice, ad hoc resolutions may concern, inter alia, subsoil users, providers of services to strategic entities, high-tech companies, and manufacturers of products that have no local analogues.

Case study: Acquisition of Port Perm

In a recent case, the regulator investigated a series of transactions that occurred between 2011 and 2016, as a result of which a foreign investor acquired a significant stake in joint stock company Port Perm, an inland waterway freight-shipping and cargo-handling operator.

In early 2020, the Russian courts rendered these transactions null and void on grounds that the foreign investor had illegally acquired de facto control over a strategic company.

SLOVAK REPUBLIC

Type of filing requirement

Mandatory. The Investment Screening Regime requires that governmental approval is requested prior to making investments in a number of strategic sectors. The owners of critical infrastructure must also notify the relevant Ministry of any commencement of insolvency proceedings, execution proceedings, or any enforcement of a pledge or similar right in relation to the owner or its assets, regardless of whether these proceedings take place in the Slovak Republic.

The new Investment Screening Regime will also apply to indirect acquisitions, therefore, any acquisition within the corporate structure of a group having a shareholding interest in a relevant Slovak company might also trigger the requirement to obtain consent from the Slovak government.

Financial penalties. If the Government refuses to consent to the transaction, an exercise of rights and obligations under this transaction related to Slovak critical infrastructure is prohibited. The applicant may challenge the Governmental decision at the Supreme Court within a 30-day period upon receipt of the decision.

Furthermore, the relevant Ministry may sanction the breach of the notification obligations with an administrative fine of up to EUR 50,000.

Nature of the review

The Investment Screening Regime applies to any owner of the critical infrastructure.

Sector-specific scrutiny relates to (i) mining, electric power engineering, gas, and oil and petroleum products in the energy sector; (ii) pharmaceuticals, metallurgical industry, and chemical industry in the industrial sector; and (iii) all critical infrastructure.

Timetable

The Ministry of Economy has 60 days to evaluate the transaction in terms of the public order or national security of the Slovak Republic, EU Member States or the EU (the "**Strategic Interests**") after receipt of the application.

Triggering events

Under the Investment Screening Regime, a relevant transaction is one that results in:

- change of ownership in the critical infrastructure including by way of a sale of business (asset deal); or
- direct or indirect change in ownership (share deal) exceeding 10% of the registered capital or voting rights, or in the exercise of influence of a comparable magnitude.

Slovak investment screening regime

On 5 February 2021, the Slovak Government approved a bill amending the Act on Critical Infrastructure, which introduces a new screening regime for certain sector-based investments (the "Investment Screening Regime").

The amending act, which was approved in an accelerated legislative process, became effective on 1 March 2021. The grounds on which the authorities may challenge proposed investments are broad and thus open to interpretation – which may present an obstacle for future transactions in Slovakia.

SPAIN

Type of filing requirement

Mandatory and suspensory. Approval of the Government must be obtained prior to closing of an investment exceeding EUR 1 million. A **financial penalty** as high as the amount of the investment can be imposed in cases of non-compliance.

Nature of the review

The Government intervenes either on grounds of (i) the strategic nature of the sector invested in ("**objective review**"), or (ii) the characteristics of the investor ("**subjective review**").

- As regards the **objective review**, the following sectors are deemed strategic (i.e., affecting public safety, public order or public health): (i) critical infrastructure (e.g., energy, transportation, water, health, media, data processing and storage, communications, aerospace, defence and electoral or financial) as well as land and real estate vital to the use of such critical infrastructure; (ii) critical and dual-use technologies (including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technology, nanotechnology, biotechnology, key technologies for industrial leadership and skills, and technology developed via programmes and projects of particular interest for Spain, including telecommunications); (iii) supply of essential produce (in particular, energy, raw materials, strategic connectivity services and food safety); (iv) access to sensitive information; and (v) media.
- As concerns the **subjective review**, the following investors are affected irrespective of the sector: (i) state-owned or controlled companies (whether directly or indirectly); (ii) those having already invested or participated in the sectors deemed strategic in other EU Member States; and (iii) if there is a serious risk of the foreign investor undertaking criminal or illegal activities that affect public safety, public order or public health in Spain.

Timetable

- If the investment is worth less than EUR 5 million, a decision shall be issued in 30 business days (investments worth less than EUR 1 million are exempt).
- If the investment is above such threshold, a decision shall be issued in six months.

In both cases, lack of response is deemed a tacit denial. Once granted, authorisations have a general validity of six months.

Triggering event(s)

A foreign investment requiring prior governmental approval takes place whenever the investor, as a consequence thereof, (i) holds **10%** or more of the share capital of a Spanish company, and/or (ii) acquires control thereof (under the definition of control established in the antitrust legislation), provided that:

- either the investor is a non-EU/ EFTA resident; or
- even if the investor is an EU/ EFTA resident, its ultimate beneficial ownership corresponds to a non-EU/ EFTA resident, such beneficial ownership being defined as (i) holding directly or indirectly in excess of **25%** of the share capital or voting rights of the investor, or (ii) when control of the investor is exercised directly or indirectly by any other means.
- transitorily until 31 December 2021, even if the investor is an EU/ EFTA resident with its ultimate beneficial ownership also in the EU/ EFTA, when (i) the target is a listed company or when (ii) the target is not a listed company but the investment is worth more than EUR 500 million. In this case, though, only the objective review applies (i.e., the Government intervenes solely on grounds of the nature of the sector invested in).

Case study: Acquisition of VIAMED by Macquarie

VIAMED SALUD, SL ("VIAMED") a health services provider that is the owner of 18 private hospitals throughout Spain, was recently acquired by a Spanish company ultimately owned by Macquarie Infrastructure and Real Assets (Europe) Limited ("MIRA"), which at its turn is an investment vehicle of Macquarie Group Limited ("Macquarie"), an Australian resident.

VIAMED, although holding only 2% of the market share, was considered to be of strategic nature under the "public health" notion, and consequently prior governmental approval had to be requested, which was granted by the Council of Ministers in its session of 6 October 2020.

UK

Type of filing requirement

Voluntary and non-suspensory. At present, filings do not have to be made, but if no clearance is sought the Government can intervene and impose remedies, including unwinding the transaction, provided the transaction meets the triggering event criteria described below.

New legislation – the National Security and Investment Act – will impose **mandatory filing obligations** for qualifying investments in Targets with certain activities in any of 17 sensitive sectors listed below, which close on or after 4 January 2022. All other qualifying investments will be subject to a voluntary filing regime, including investments that closed on or after 12 November 2020.

Nature of the review

National security. Transactions in any sector can be reviewed, but there is a higher risk of a national security intervention if the Target has certain activities in any of the following 17 sensitive sectors: civil nuclear; communications; data infrastructure; defence; energy; transport; artificial intelligence; autonomous robotics; computing hardware; cryptographic authentication; advanced materials; quantum technologies; engineering biology; critical suppliers to government; critical suppliers to the emergency services; military or dual-use technologies; and satellite and space technologies. Investments in real estate that is used for sensitive activities or that is proximate to such a site will also carry a higher risk.

Timetable

At present, the Government has until four months from closing to decide whether to initiate a detailed Phase II investigation, but it will typically do so anywhere between 20-80 working days from the date on which a deal is notified or called in for review. A Phase II review lasts a further six-eight months.

Under the new regime, there will be a 30-working day initial review period, within which the Government will decide whether to carry out a detailed review, and an additional 30-75 working day period to carry out such a detailed review (the clock will stop if the Government asks for further information).

Triggering events

An investment is reviewable under the current voluntary filing regime if it confers at least "material influence" over the Target (which can be as low as **15%** with no board seat) and the turnover and/or market share thresholds under the UK merger control regime are satisfied. Those thresholds usually require that the Target has a UK turnover of GBP70 million or more, or that the Target and investor both supply or purchase the same products or services and have a share of such supplies/ purchases of 25% or more in the UK or a part of it. However, lower thresholds apply if the Target is a government defence contractor or has activities in military/ dual-use products, certain advanced materials, artificial intelligence, quantum technologies, cryptographic authentication, or IP or roots of trust relating to computer processing units.

Under the National Security and Investment Act, filing will be mandatory for investments in legal entities with certain UK activities in any of the 17 sensitive sectors listed above, if the investment causes the investor's shareholding or voting rights to exceed a threshold of 25%, 50% or 75%, or it allows the investor to veto or determine any class of resolution relating to the Target's affairs.

In addition, the government will have powers under the voluntary filing regime to review (up to 5 years after closing):

- investments in legal entities (active in any sector), if they (i) cause the investor's shares or voting rights to exceed a 25%, 50% or 75% threshold; (ii) allow the investor to veto or determine any class of resolution relating to the Target's affairs; or (iii) confer material influence over the Target; and
- investments in assets (in any sector) that allow the investor to use the asset, to direct or control how the asset is used, or to do so to a greater extent than before the transaction. Assets for these purposes are land, tangible moveable property and certain intellectual property.

These review powers under the voluntary regime will apply to investments that closed on or after 12 November 2020.

Case study: Acquisition of Inmarsat by a British, U.S. and Canadian consortium

The Government intervened on the basis that the transaction could lead to unauthorised access to sensitive defence and security data held by Inmarsat (a provider of satellite communications services) and that strategic capabilities of Inmarsat could cease to operate or be sold or transferred abroad. To address these concerns (without requiring a Phase II investigation), the Government accepted various undertakings, including commitments to maintain certain strategic capabilities, implement controls on sensitive data and make key strategic decisions in the UK.

AUSTRALIA

Type of filing requirement

Mandatory and suspensory for foreign acquisitions that meet relevant monetary/control thresholds and where no exemptions apply.

An application must be made to the Foreign Investment Review Board ("**FIRB**") to obtain a letter of "no objections" from the Treasurer of Australia prior to completion of the transaction, if the transaction involves a "notifiable action" or "notifiable national security action" as defined under the Foreign Acquisitions and Takeovers Act 1975.

Failure to obtain such approval can result in **civil and criminal sanctions**.

Nature of the review

The Treasurer, advised by the FIRB, has the power to examine proposed foreign acquisitions and prohibit acquisitions determined to be contrary to the national interest, or impose conditions on the proposed acquisition to remove national interest concerns. The Treasurer also has a "call-in power" to review any decision not previously notified to the FIRB which is a "significant action" or a "reviewable national security action" which may pose a national security concern, for up to 10 years after the acquisition has completed.

Typically, matters that the Treasurer will take into consideration when making a decision include the impact of the acquisition on the Australian economy and community, national security and competition. Businesses, corporations or assets in certain sensitive sectors such as media, agriculture, telecommunications, defence and military, transport and encryption and security technologies are subject to stricter regulation.

The FIRB may consult with government agencies such as the Critical Infrastructure Centre and the Australian Tax Office as part of its decision-making process. It is common for the FIRB to impose standardised tax compliance conditions on any "no objections" approval.

Timetable

The Treasurer has **30 calendar days** from notification to make a decision plus **10 calendar days** to notify the applicant. This timing is subject to potential extension/ FIRB issuing an "interim order" preventing the investment for a period of up to 90 days while it considers the proposed acquisition.

In practice, FIRB approval normally takes **two to three months**.

Triggering events

- Approval is required for "notifiable actions", which include direct or indirect acquisitions by a foreign investor of **>20%** in a Target's securities if the Target is an Australian corporation carrying on an Australian business, an Australian trust unit, or a holding entity of either of these, and the Target is valued above certain monetary thresholds, subject to any applicable exemptions.
- Monetary thresholds are dependent on the type of asset and whether the acquiror is a foreign person or a "foreign government investor" (such as sovereign wealth, public sector pension, government agencies, SOEs).
- Stricter rules/lower thresholds apply in relation to **foreign government investors** (typically a >10% threshold, which can reduce to 5%) and sensitive sectors.
- Mandatory FIRB approval is also required for "notifiable national security actions". This includes starting a national security business, acquiring a direct interest in a national security business or acquiring an interest in national security land. National security businesses are endeavours that, if disrupted or carried out in a particular way, may create national security risks, such as critical infrastructure assets, telecommunications or defence. These actions have a $0 monetary screening threshold.

Case study: Withdrawal of China State Construction Engineering Corp acquisition of Probuild

On 12 January 2021, China State Construction Engineering Corporation withdrew a bid to acquire an 88% stake in Probuild, an Australian subsidiary of a South African-owned company, based on advice that the application would be rejected by the FIRB on the grounds of national security. While Probuild's focus is usually on residential towers and shopping malls, it is understood the existing development of a new headquarters for the Victoria police and a new headquarters for a biotech giant trigged national security concerns, resulting in the withdrawal of the application.

CANADA

Type of filing requirement

- For direct acquisitions of control that exceed the applicable financial threshold under the *Investment Canada Act* (ICA), a **mandatory pre-closing application for review** must be made and an approval of the Minister of Innovation, Science and Industry Canada (the ISI Minister) (or, in the case of cultural businesses, the Minister of Canadian Heritage (the Heritage Minister)) must be obtained **prior to implementation** of the investment.
- For indirect acquisitions of cultural businesses that exceed the applicable financial threshold, a **mandatory application** for review must be made, and an approval by the Minister of Canadian Heritage must be received, though the process can be **completed before or after closing**.
- For direct acquisitions of non-cultural businesses that do not exceed the applicable financial threshold, as well as indirect acquisitions of non-cultural businesses and the establishment of new Canadian businesses (regardless of the identity of the purchaser), a **notification** filing (which does not have an associated approval) is **required** and can be made **either before or within 30 days after closing**.

Penalties may include an order to divest the Canadian business and a maximum financial penalty of C$10,000 per day for contravention of the ICA.

Nature of the review

Net benefit review: Investments that are subject to review must demonstrate to the ISI Minister that the transaction is "likely to be of net benefit to Canada" in order to obtain the requisite approval, e.g., impact of the investment on economic activity, productivity and efficiency in Canada etc. In connection with obtaining approval, investors are typically expected to provide binding undertakings to the ISI Minister.

National security review: The ICA sets out a national security review regime that is separate from the general provisions noted above. For these types of investments, the ISI Minister can order a review to determine whether they are injurious to Canada's national security. Under the national security review regime, the government is empowered to: (i) require the investor commit to undertakings, (ii) block the investment in the case of a pre-closing national security review, or (iii) order a divestiture in the case of a post-closing national security review.

CANADA
(CONTINUED)

Timetable

Net benefit review: The statutory period for a “net benefit” review is 45 days from the date a complete application is received, which is extendable unilaterally by an additional 30 days by the government, and extendable further with consent of the investor.

National security review: If the ISI Minister intends to initiate the national security process, he or she can do so only from the time when he or she becomes aware of the investment until 45 days of the receipt of a complete application or notification (where a filing is required) or within 45 days of closing (where no filing is required). Once a national security process has been triggered, a complete review may take up to 155 additional days.

Triggering event(s)

The filing obligations under the ICA apply to the following investments by a non-Canadian: (i) direct or indirect acquisition of control of a Canadian business, and (ii) establishment of a new Canadian business.

Control is defined as (1) the acquisition of greater than 50% of the voting interests of an entity directly or indirectly carrying out a business in Canada (note that a lower threshold of 33.3% applies to corporations, although the presumption of control is rebuttable) or (2) an acquisition of all or substantially all of the assets used in carrying out a business in Canada.

A “net benefit” review and approval is required only for a direct acquisition of control (or an indirect acquisition of control of a “cultural business”) that exceeds certain relevant financial thresholds.

Investments injurious to national security: An acquisition of all or part of a Canadian business (whether or not it constitutes an acquisition of control) may be subject to a national security review where the ISI Minister determines it may be injurious to Canada’s national security. Investments involving sensitive sectors such as defence, critical infrastructure, critical goods and services, strategic materials, investments into businesses with proximity or access to sensitive government installations, investments by state-owned enterprises, and investments by investors from certain jurisdictions (notably the People’s Republic of China, Russia and in the Middle East) often attract increased national security scrutiny.

Recent Developments

On 24 March 2021, the government updated its Guidelines on the National Security Review of Investments (Guidelines), which contain enhanced national security review measures in respect of foreign investment into Canada. The Guidelines adopt several national security-related measures put in place at the start of COVID-19. In particular, all SOE investments and investments by private investors closely tied to foreign governments will be subject to enhanced scrutiny under the ICA, regardless of the investment’s value. Additionally, the impact an investment may have on the potential supply of (1) critical goods and services to Canadians and (2) goods and services to the Government is a relevant factor in a national security determination. Investors should be conscious of the Guidelines when partnering with a state-owned enterprise (SOE), acquiring sensitive technologies, engaging in the supply of critical goods and services to Canadians, investing in critical minerals or critical mineral supply chains, or accessing sensitive personal data.

CHINA

Type of filing requirement

Mandatory and suspensory. If national security issues are raised in the context of a foreign-domestic transaction, it would be mandatory to seek **National Security Review ("NSR") clearance**. A separate **Foreign Investment Review ("FIR")** is also mandatory for investments subject to restrictions in the Negative List (as prescribed in the current Special Administrative Measures on Access to Foreign Investment). Penalties for breach in the context of NSR clearance include an order to notify the transaction, make rectification and **unwind the deal**. Closing without FIR approval will also render the transaction invalid.

Nature of the review

NSR – The NSR process applies to the foreign investments (including greenfield investments, acquisition of equity or assets of a company in China and foreign investments in China in any other way) in China involving any of the following sectors:

- investments in military and related or adjacent activities; or
- investments in key agricultural products, key energy and resources, key equipment manufacturing, key infrastructure, key transportation services, key cultural products and services, key information technology and internet products and services, key financial services, key technologies or other key sectors that bear on national security; AND the foreign investor(s) will acquire *de facto* control over the invested enterprise in any of the foregoing sectors.

The above-mentioned investment must be notified to a newly established interministerial government body, the NSR working mechanism office.

FIR – All foreign investments in Chinese companies subject to restrictions in the Negative List have to be reviewed and approved by the central Ministry of Commerce (or its local counterparts) or certain other sector-specific regulators.

Timetable

NSR

- Preliminary review: 15 business days from the receipt of all the required materials;
- General review: 30 business days; and
- Special review: 60 business days (may be extended under certain special circumstances).

FIR – The approval time frame varies depending on the authority in question.

Triggering events

NSR – In relation to transactions involving the military sector, an NSR process may be triggered irrespective of the interest to be acquired in the Target.

In the case of other sectors, an NSR process may be triggered only if the foreign investor intends to acquire *de facto* control (50% interests; significant influence over the shareholders' meeting or the board; or *de facto* control over business decisions, financial affairs, personnel and/or technology or other matters) of the Chinese Target.

FIR – Foreign investment in restricted sectors will be subject to approval and certain restrictions such as a cap on foreign ownership percentage.

Case study: Yonghui Superstores/ Zhongbai Holdings

Yonghui Superstores intended to acquire a controlling interest in Zhongbai Holdings, a Chinese state-owned retailer. The National Development and Reform Commission ("**NDRC**") intervened as 19.99% of the shares in Yonghui were owned by a foreign entity, Dairy Farm International (which is ultimately controlled by Jardine). It is widely believed that the NDRC commenced its NSR process primarily out of national defence concerns due to Zhongbai's essential role as the major provider of warehousing and distribution to the 2019 Military World Games and Zhongbai's store network in certain military colleges in Wuhan. The retail sector is likely to be considered as a sensitive sector by the NDRC. Eventually, Yonghui withdrew its tender offer in December 2019 following the NDRC's commencement of a special review process.

JAPAN

Type of filing requirement

Mandatory and suspensory for acquisitions by foreign investors of shares in Japanese companies operating in **certain restricted sectors ("Inward Direct Investment")** and acquisitions by foreign investors from other foreign investors of shares in Japanese unlisted companies operating in **certain restricted sectors ("Specified Acquisitions")**, in the absence of exemptions. A pre-closing filing must be made with the Minister of Finance and other relevant ministers through the Bank of Japan.

Acquisitions by foreign investors of shares in Japanese companies in **non-restricted sectors** are subject to a post-acquisition report.

The government may pass an order to unwind, discontinue or alter a deal. Criminal sanctions, including imprisonment, are possible in case of a breach of such order.

Nature of the review

A pre-closing filing process regarding Inward Direct Investment applies if the deal involves certain restricted sectors such as businesses involving the manufacturing of weapons, aircraft, artificial satellites, nuclear reactors, and accessories or parts of the above, telecommunications, IT services, software, pharmaceuticals regarding infectious diseases, certain medical devices, and certain protected domestic industries including agriculture and fishing, whereas a post-acquisition report process applies to other sectors.

A pre-closing filing process regarding Specified Acquisitions applies if the deal involves certain businesses that may impair national security such as the manufacturing of weapons, aircraft, artificial satellites, nuclear reactors, and accessories or parts of the above, software, integrated circuits, etc.

During the pre-closing filing process, the government can review and prohibit an investment in a Japanese company if such investment may have an adverse effect on national security, public order, public safety or the Japanese economy.

Timetable

A **pre-closing filing** must be made 30 calendar days before such acquisition, and the parties cannot complete the investment before obtaining approval. The 30-day prohibition period is often shortened to 14 calendar days. In certain cases, the relevant ministers may, however, extend the prohibition period to up to five months.

A **post-acquisition report** must be made 45 calendar days following the investment.

Triggering events

A **pre-closing filing** relating to share acquisitions for an **Inward Direct Investment** or equivalent action is required if a foreign investor (i) directly acquires a single share of a non-listed Japanese company or directly acquires **1%** or more of the issued shares or voting shares of a listed Japanese company AND (ii) such Japanese company operates in certain restricted sectors; provided that there are exemptions such as those for certain financial firms (e.g., securities firms, banks, insurance companies and asset managers). There are other types of Inward Direct Investments which may trigger a filing in Japan, such as a transfer of business by a Japanese company and appointment of a director of a Japanese company.

A pre-closing filing for a Specified Acquisition is required if a foreign investor (i) directly acquires a single share of a non-listed Japanese company from another foreign investor AND (ii) such Japanese company operates in certain restricted sectors. There are some exemptions such as those for certain financial firms; however, if the Japanese company operates in the core sectors designated by the government such as the manufacturing of weapons, aircraft, etc., these exemptions do not apply.

A post-acquisition report is required if a foreign investor directly acquires listed Japanese companies meeting the exemptions, and for most investments in non-listed Japanese companies that are not subject to a pre-closing filing requirement.

Case study: TCI Transaction

The government issued an order of discontinuance for a proposed investment in The Electric Power Development Co. Ltd. (also known as J Power) by The Children's Investment Fund ("**TCI**") on the grounds that such investment might jeopardise public order. This is the only case where an order of discontinuance has been issued.

USA

Type of filing requirement

Mandatory. The approval of the Committee on Foreign Investment in the United States ("**CFIUS**") must be obtained prior to closing certain non-US investments.

Voluntary. Even if a mandatory filing requirement does not apply, a voluntary notification may be advisable.

Non-notified transactions are subject to post-closing review and can be unwound.

Financial penalties. Civil fines of up to the entire value of the transaction for failure to make a mandatory filing. Such penalties do not apply to voluntary filings.

Nature of the review

CFIUS can impose mitigation or conditions to address any identified national security risks. In certain instances, the President, based on CFIUS's findings, can block pending non-US investments. Currently, the broad focus of CFIUS reviews is on transactions in the defence, telecommunications, energy, high-tech and emerging technologies, and (increasingly) food and medical industries, as well as transactions dealing with specific areas of U.S. national infrastructure and those which involve access to and collection of sensitive personal information on individual persons.

Timetable

In practice, the entire process takes approx. one to six months, with a timeline set by statute. CFIUS filings can be either a short form declarations or full notices:

- **Phase I, Review Period**: 45 days (30 days for expedited declarations);
- **Phase II, National Security Investigation**: 45 days; and
- **Phase III, Presidential Review**: 15 days (rare).

Triggering events

Mandatory Filing:

- *State-owned enterprises*: Direct or indirect investments by entities owned **49%** or more by a non-U.S. government that obtains a **25%** or more voting stake in a TID U.S. business (involved in "Critical [**T**]echnology", "Critical [**I**]nfrastructure" or "Sensitive Personal [**D**]ata").
- *Other foreign investors*: Direct or indirect investments in a TID U.S. business that produces, designs, tests, manufactures, fabricates or develops Critical Technologies. These technologies are defined by export control licensing requirements for "Defense Articles" and "Defense Services" controlled under the International Traffic in Arms Regulations ("**ITAR**"), and various dual-use and other commercial items subject to the Export Administration Regulations ("**EAR**"). Non-US items can be subject to these regulations (and therefore critical technologies) if they contain or incorporate certain US-origin content or technologies above certain thresholds.

Voluntary Filing:

- Recommended when the risk of a post-closing CFIUS intervention exceeds the burdens of filing. This depends on the U.S. Target's sensitivity; the non-U.S. investor's ownership, activities and intentions; and the parties' tolerance for continued CFIUS risk to the deal.

Real Estate Transactions:

- CFIUS may review real estate transactions in certain sensitive locations that are within statutory proximity thresholds to certain airports, maritime ports, military installations and sensitive government facilities.

Case study: StayNTouch divestment by Chinese company

In 2020, at CFIUS's recommendation, the U.S. President forced Beijing Shiji Information Technology Co., Ltd., and a wholly-owned direct subsidiary (collectively "**Shiji**") to divest all interest in StayNTouch, a U.S. information technology (IT) company engaged in the hospitality management software business. The divestment order stated that there was "credible evidence" that Shiji, which acquired StayNTouch in 2018, "might take action that threatens to impair the national security of the United States." While divestment is rare, Shiji did not make a voluntary CFIUS filing and CFIUS intervened post-closing by directing Shiji to submit a CFIUS notice, which ultimately resulted in the divestment order.

OVERVIEW OF FOREIGN INVESTMENT REGIMES

Jurisdiction	Thresholds	Timeline	Suspensory?	Civil sanctions?
EU	No particular threshold at the EU level. The EU Screening Regulation applies if the national foreign investment regimes of the Member States are triggered.	35 calendar days to submit a non-binding opinion/ comments; the deadline can be extended	No	No
Austria	Direct or indirect acquisition by a **non-EU/non-EEA/ non-Swiss investor** of: • a business or legal entity located in Austria; • material parts of a business located in Austria resulting in the acquisition of a controlling influence over such parts of a business; • a controlling influence over a business or legal entity located in Austria; or • a shareholding with which at least 10% of the voting rights (if the Austrian Target is active in a highly critical sector) or 25% of the voting rights (if the Austrian Target is active in a "merely" critical sector) is reached or exceeded.	EU Screening Mechanism: 35 days (or longer) Phase I: additional 1 month Phase II: additional 2 months	Yes	Yes (also criminal)
Czech Republic	Acquisitions by non-EU investors of: 10% or more of voting rights; membership of the foreign investor (or its related party) in corporate bodies of the Target; the asset through which Target's business activity is carried out; or any other type of control resulting in the investor gaining access to information, systems or technology which are important in connection with the protection of the security of the Czech Republic, or its internal or public order.	90 calendar days; may be extended by up to 30 calendar days in particularly complex cases	Yes	Yes
France	Acquisition of control (or any business division) or (for non-EU/ EEA investors only) 25% of voting rights (which 25% threshold has been temporarily lowered until 31 December 2021 to 10%, only for listed companies in France).	Phase I: 30 business days Phase II: 45 business days	Yes	Yes (also criminal)
Germany	10%, 20% or 25% of voting rights in German Targets by non-EU investors (cross-sectoral) or 10% by non-German investors (sector-specific). If an investor already holds 10%, 20% or 25%, the additional increase of the voting rights triggers a further application if certain voting rights thresholds are met.	Cross-sectoral and sector-specific: Phase I: 2 months, Phase II: an additional 4 months; can be extended by further 4 months in complex cases	Yes	Yes (also criminal)

OVERVIEW OF FOREIGN INVESTMENT REGIMES
(CONTINUED)

Jurisdiction	Thresholds	Timeline	Suspensory?	Civil sanctions?
Hungary	General FDI Regime: investments which lead to total foreign investment exceeding 25% (private companies) or 10% (publicly listed companies). Non-percentage thresholds also apply. Special FDI Regime: majority control; or 10% control where the investment exceeds EUR 1 million; or investment where total foreign investment exceeds 25%; or increases in ownership to 15%, 20% or 50%.	Notification to be made within 10 days of signing. 60 days (General FDI Regime) and 30 business days (Special FDI Regime) to decide on the transaction, potentially extended by 60/15 days.	Yes	Yes
Italy	Defence and national security: acquisition exceeding 3% of the Target's capital. Other sectors: (i) if EU acquirers, acquisition of control, (ii) if non-EU acquirers, (1) acquisitions of 10% AND investment's value equal to EUR 1 million; OR (2) acquisition of 15%, 20%, 25% or 50%.	45 days (30 days for the 5G sector)	Yes	Yes
The Netherlands	Telecommunications acquisition of predominant control, including, in any event:(1) the possession (solely or jointly) of at least 30% of the (direct or indirect) voting rights, (2) the ability to name more than half the board members, or (3) the ability to exercise control through special governance rights.	8 weeks, potentially extended by 6 months	No	Yes
Poland	Acquisitions by non-EU/ EEA/ OECD investors of 20% or 40% of shares/ profit, acquisition of dominance/ control (including. management) or lease of an organised part of the enterprise of a protected Polish company.	30 working days for initial proceedings; if no approval – an additional 120 calendar days to issue a decision.	Yes	Yes (also criminal)
Romania	Currently, change of control performed in a number of areas of interest from a national security perspective. (A draft new law includes new areas, certain thresholds and a catch-all provision which is applicable irrespective of such thresholds).	Currently, there are no mandatory deadlines for the review and response. From our experience there is a period of 45-60 days since filing, in case the response is positive. (draft new law includes a number of deadlines).	Currently, no express provisions. (A draft new law includes an express stand-still obligation and the possibility of an *ex officio* review of a transaction).	Currently, none, but draft new law includes fines.

OVERVIEW OF FOREIGN INVESTMENT REGIMES
(CONTINUED)

Jurisdiction	Thresholds	Timeline	Suspensory?	Civil sanctions?
Russia	Acquisitions of 25% or more in subsoil strategic entities or above 50% in all other strategic entities. Lower thresholds for state-owned foreign investors.	3-6 months, but can also take longer.	Yes	Yes
Slovakia	Any (i) change of ownership in the critical infrastructure including by way of a sale of business (asset deal), or (ii) direct or indirect change in ownership (share deal) exceeding 10% of the registered capital or voting rights, or in the exercise of influence of a comparable magnitude.	60 days for evaluation by the Ministry of Economy.	Yes	Yes
Spain	10% of share capital or acquisition of control.	Investments worth below EUR 5 million: 30 business days. Investments worth EUR 5 million or more: 6 months.	Yes	Yes
UK	If material influence over Target (can be as low as 15%) and certain turnover or share of supply thresholds are met. New legislation: mandatory filing for investments that close on or after 4 January 2022 in a target with sensitive activities which either exceed a threshold of 25%, 50% or 75% of shares or voting rights, or confer the ability to veto or determine any class of resolution. Voluntary filing for other investments that (for investments in legal entities) meet the criteria above or confer material influence or (for investments in assets) allow the investor to use/ direct/ control the asset, or to do so to a greater extent. Deals that closed on or after 12 November 2020 will be reviewable under the voluntary regime.	Phase I: No deadline. Can take anywhere between 20-80 working days. Phase II: 6-8 months New legislation: Phase I: 30 working days Phase ii: an additional 30-75 working days.	No New legislation: yes, for investments subject to mandatory filing.	None New legislation: criminal penalties of up to 5 years imprisonment and fines of up to 5% of worldwide turnover.
Australia	Various. Generally, acquisitions of >20% in an Australian Target and acquisitions of interests in Australian land will require FIRB approval.	Approximately 60-90 days.	Yes	Yes (also criminal)

OVERVIEW OF FOREIGN INVESTMENT REGIMES
(CONTINUED)

Jurisdiction	Thresholds	Timeline	Suspensory?	Civil sanctions?
Canada	Various thresholds, inter alia, acquisitions of control when exceeding certain financial thresholds; establishment of a new Canadian business; non-control investments injurious to national security.	Net benefit review: 45 days from complete application; can be extended by additional 30 days or with consent of the investor. National security review: up to 155 days after initiating proceedings, subject to additional extensions on consent (200 days from date of complete application or notice).	Yes (for direct acquisitions exceeding financial threshold or for certain indirect acquisitions involving a cultural business).	Yes
China (National Security Review process)	Acquisition of any stake (for Targets in military or related industry), or acquisition of actual control (for Targets in other sectors).	Preliminary review: 15 business days. General review phase: 45 business days (from application). Special review: 105 business days (from application).	Yes	Yes
Japan	Pre-closing filing: (i) acquisition of (x) a single share of a non-listed Japanese company; or (y) acquisition of 1% or more of the issued shares or voting shares of a listed Japanese company; AND (ii) such Japanese company is in certain restricted sectors. Various other thresholds, including the transfer of a Japanese business and the appointment of a director of a Japanese company. Post-acquisition report: certain investments in listed companies meeting the exemptions, and most investments in non-listed companies that are not subject to a pre-closing filing requirement.	Pre-closing filing review: 30 calendar days, although often shortened to 14 calendar days. Potentially extended to up to 5 months. Post-acquisition report: 45 calendar days following the investment.	Yes	Only criminal sanctions
USA	Fact-intensive/ No percentage threshold.	Phase I: 30-45 days Phase II: 45-60 days Phase III (rare): 15 days	Yes (for mandatory filings)	Yes (for mandatory filings)

RECENT PUBLICATIONS

We produce a wide range of publications and client briefings in relation to foreign investment regulations in various jurisdictions. These are available via our internet page www.cliffordchance.com/briefings.html.

New Czech foreign direct investment screening regime

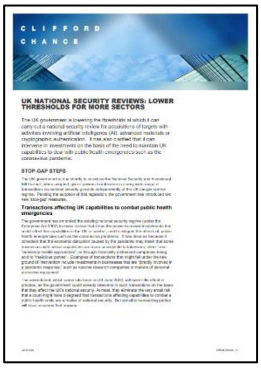
Narrower definitions for mandatory filing sectors announced for the UK national security screening regime

New Slovak investment screening regime

The UK's National Security and Investment Bill: key points and implications

UAE Foreign Direct Investment Update

EU Foreign Investment Screening Regulation takes effect: a high-level review of regimes across Europe



UK national security reviews: lower thresholds for more sectors

Poland introduces control over Non-EU/Non-OECD investments in certain sectors

EU proposals for new powers to address foreign subsidies

Germany tightens foreign direct investment controls

A Legal Overview of Foreign Investment in Russia's "Strategic" Sectors

Germany tightens foreign direct investment controls with particular focus on healthcare sector

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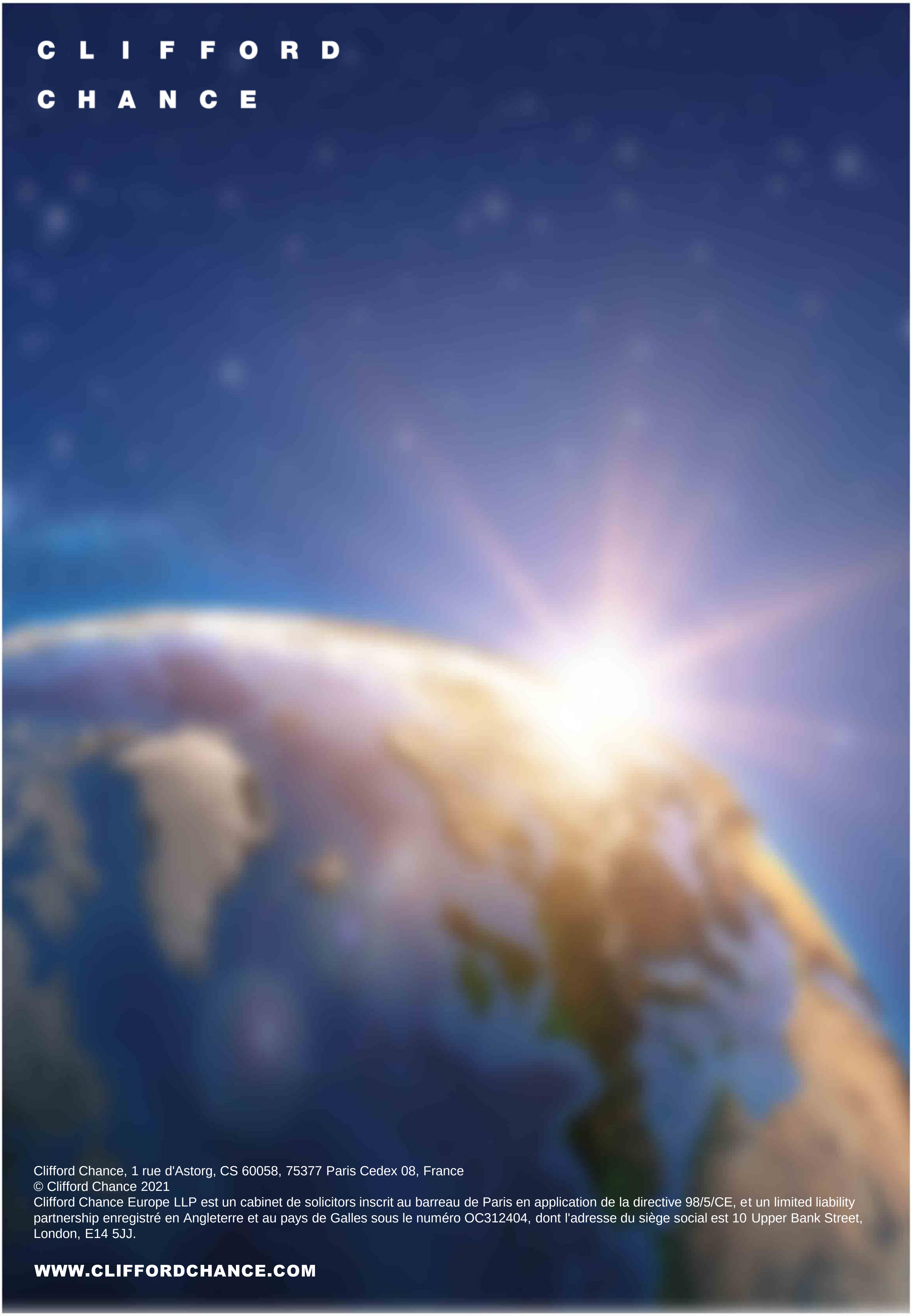

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